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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1342

ALLEN KLEIN

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Allen Klein submits this brief in reply to certain contentions contained in the government's opposing memorandum,[1] and to call to this Court's attention a recent decision of the Court of Appeals for the District of Columbia, in conflict with the decision below (see p. 6 *infra*).

[1] The government's opposing memorandum significantly fails to controvert material portions of the Petition. With respect to Point I, it fails to deny that (i) Klein has effectively been denied his fundamental right to appellate review of his multiplicity objection, overruled by Judge Metzner before the first trial (Pet. pp. 9-10); (ii) the procedure followed by Klein was in compliance with rule 12, Fed.R.Crim.P., which preserves for appeal such pre-trial objection without later renewal (*id.* at p. 10); and (iii) in submitting requests to charge on the multiplicitous counts, and in refraining from remaking the already-denied motion to dismiss, Klein's counsel was adhering to mandatory standards of professional conduct (*id.* at pp. 12-13). Concerning Point II, the government significantly offers no justification for having adduced evidence on the subject of Klein's alleged involvement in bribe payments to customs officials.

I
Concerning The Multiplicity Objection

1. Point I of the Petition raised the important and recurring legal issue, warranting decision by this Court, of whether a defendant must remake a previously-denied motion to dismiss, first made as part of his rule 12 pre-trial motion, in order to preserve his multiplicity objection. Without questioning the significance of this issue, the government, relying on erroneous record assertions, argues that the record does not clearly present this issue. This argument is without basis:

a. The government claims that the second trial judge precluded the issue from arising by stating "that he did not consider the rulings made in the first trial binding upon him" (Gov't Mem. p. 3), thereby giving notice that the law-of-the-case doctrine did not apply. But, in fact, he made no such statement; the appendix pages cited by the government (JA2137-38)[2] show only that he remarked, "I have not intended to go through the transcript of the first trial except as it becomes necessary to decide anything that is before me." Court and counsel were then discussing only *evidentiary* issues, which, as we showed (Pet. p. 11n.3)—without dispute from the government—are beyond the scope of the law-of-the-case doctrine. Klein's pre-retrial memorandum reference to the inapplicability of that doctrine (Gov't Mem. p. 4) was likewise limited to *evidentiary* questions. Indeed, the pages of the pre-retrial hearing immediately following those cited by the government make explicit that the colloquy concerning the second trial court's reconsideration of any previously made decision by the first trial court was limited to evidentiary issues; both the second trial court and the prosecutor expressly stated that they were discussing "evidentiary matters" only (Hearing of Nov. 22, 1978, pp. 14-17).[3] There is, thus, no

[2] Citations bearing the prefix "JA" refer to pages of the Joint Appendix filed in the Court of Appeals.

[3] The prosecutor described the matters then being raised by defense counsel as "evidentiary matter that your Honor should resolve at the time of the trial when your Honor again can see in what context it arises." The court also described the issues as "evidentiary matters" which he would decide when "the matter comes up at trial." The prosecutor concluded by summarizing his position: "[i]f it is an evidentiary issue," the second trial judge should make a determination upon its arising at trial.

suggestion in those pre-retrial proceedings that Klein was required to reassert the motion to dismiss previously determined by the first trial judge.

b. Contrary to the government's conclusory assertion (Gov't Mem. p. 3n.2), count 4 was unambiguously multiplicitious. The government's own brief factual statement (Gov't Mem. p. 2) specifies that "the basis for the false filing count" was Klein's "failure to disclose the receipt of the record proceeds on his personal income tax return"—the very basis of the tax evasion count. From the government's bill of particulars (JA2074-76), furnished before the first pre-trial motions were decided, through the charge to the jury in the second trial, the government has consistently specified that whether Klein received record proceeds was the single determinative issue on both the tax evasion and false filing counts. The second trial court expressly instructed the jury on all counts that "[t]he essential factual issue that is presented is whether Mr. Bennett gave Mr. Klein proceeds from the sale of promotional records" (JA1482, 1489-90, 1503). In fact, as the court acknowledged to counsel before it commenced this charge (JA1312), no further disputed factual issue existed to distinguish between the two sets of counts.

c. Also contrary to the government's assertion (Gov't Mem. p. 3n.3), the first trial court's denial of Klein's rule 12 motion to dismiss was not ambiguous: it was unconditional. The denial did not contain the "without prejudice to renewal" language which a court would certainly insert if it so intended.[4] Moreover, the cases cited in support of the denial do not even implicitly suggest that it was without prejudice to renewal; for example, in one of these cases, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), this Court affirmed the *pre-trial* dismissal of 29 counts of a 32 count indictment on multiplicity grounds, and expressly noted the defendant's right to call upon the government to elect *before trial*. *Id.* at 225. Finally, the

[4] *E.g.*, *United States* v. *Pocono International Corp.*, 378 F. Supp. 1265, 1269 (S.D.N.Y. 1974), which denied a multiplicity motion as possibly "premature" due to the specific facts in that case, but expressly stated that such denial was "without prejudice to renew during the trial."

first trial court's memorandum decision makes clear that it was not based on any factual uncertainty which might be eliminated at trial, but on the erroneous legal premise that the false filing charge was not multiplicitous because it charged "the verification of tax returns under penalty of perjury which he did not believe to be true," whereas the tax evasion counts merely charged "the filing of a false and fraudulent return" (JA2072(52)).

2. Contrary to the government's assertion (Gov't Mem. p. 5n.4), a lesser-included false filing charge would not have been proper had count 4 been dismissed. As this Court stated, "a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." *Sansone* v. *United States,* 380 U.S. 343, 349-50 (1965). *Accord: United States* v. *Bishop,* 412 U.S. 346, 361 (1973); *Berra* v. *United States,* 351 U.S. 131, 134-35 (1956). Even *Keeble* v. *United States,* 412 U.S. 205, 208 (1973), cited by the government, authorizes a lesser-offense instruction only "if the evidence would permit a jury *rationally* to find [the defendant] guilty of the lesser offense and acquit him of the greater" (emphasis added). Here, as discussed above, the determinative issue was identical in counts 4 and 1, thus precluding any lesser-included offense charge.

3. The government (Gov't Mem. p. 5n.5) distinguishes, as limited to constitutional rights, this Court's prior holdings (Pet. p. 14) that a defendant can be bound by a waiver inferred from his counsel's conduct only if the facts establish an "intentional relinquishment . . . of the known right." But another panel of the court below earlier held that a waiver of a *non*-constitutional right required that identical showing. *Tatum* v. *Cardillo,* 208 F.2d 955 (2d Cir. 1953). In addition, the government's contention raises the important issues of the standard to be applied by lower courts in finding a waiver on the basis of an attorney's conduct, and whether a defendant is entitled to an evidentiary hearing before thus being bound.

II

Concerning The Prosecutor's Adducing Evidence Of Klein's Alleged Immorality And Other Unrelated Misconduct

1. The linch-pin of the government's argument upholding the admissibility of Klein's prior misdemeanor conviction for non-filing of withholding tax returns is the conclusory assertion —without citation of any authority—that it "clearly involved an attempt to defraud the revenue" (Gov't Mem. pp. 5-6).[5] But, as we showed (Pet. pp. 17-18), this conflicts with other decisions, uniformly holding that a non-filing misdemeanor conviction does not require any intent to deceive or defraud. Indeed, the jury in Klein's prior misdemeanor trial was so instructed (JA2110).

The government also relies on "the specific underlying facts of the [prior misdemeanor] conviction" as a basis for finding that it "involved dishonesty or a false statement" within the meaning of rule 609(a)(2), Fed.R.Evid. (Gov't Mem. p. 6). The important and recurring criminal justice issue raised herein, on which there is a conflict among the circuits, is thereby highlighted: should admissibility of a defendant's prior misdemeanor conviction be determined strictly on the elements of the prior conviction or on the underlying facts? Indeed, since

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[5] *United States* v. *Apuzzo,* 555 F.2d 306 (2d Cir. 1977), *cert. denied,* 435 U.S. 916 (1978) and *United States* v. *De Angelis,* 490 F.2d 1004 (2d Cir.), *cert. denied,* 416 U.S. 956 (1974), cited by the government immediately *preceding* this statement (Gov't Mem. p. 5), did not involve non-filing offenses. Those decisions hold only that prior convictions for the affirmative act of smuggling cigarettes not bearing revenue stamps are veracity-related within the scope of 609(a)(2). By refusing to affix revenue stamps (the sole procedure for advising the government of the tax obligation), in addition to smuggling (which leads to the destruction of taxable cigarettes through *sale* and consumption), these defendants not only effectively barred the government from learning about the tax that should be paid, but also defrauded the revenue by avoiding payment of the tax upon purchase. For example, the prior conviction in *Apuzzo* involved a violation of N.J. Stat. Ann. 54:40A-28 (West, 1960), which prohibits sale of unstamped cigarettes [see *State* v. *Oates,* 300 A.2d 865 (N.J. Super. Ct. App. Div. 1973)]; the *De Angelis* trial court described the violation there as "*faking* cigarette tax." Appendix to *United States* v. *De Angelis* at 279 (emphasis added).

the Petition was filed, the Court of Appeals for the District of Columbia Circuit rendered a decision in direct conflict with the government's position and with the decision of the court below. In *United States* v. *Lewis,* No. 79-1275, slip op. (D.C. Cir. March 3, 1980), it held:

> "Contrary to the Government's construction, we do not perceive that it is the manner in which the offense is committed that determines its admissibility. Rather we interpret Rule 609(a)(2) to require that the crime 'involve dishonesty or false statement' as an *element* of the statutory offense" (emphasis added).[6]

2. At trial, the government offered evidence of Klein's misconduct—in receiving advances from ABKCO which he never repaid, vouchered or reported as income—to establish, *inter alia,* Klein's "attitude with respect to the payment of taxes" (JA757), "dishonesty" (JA1469a), and "lack of candor" (JA1393-94, 1469a). It now contends that the evidence was admissible because Klein had "opened the door" by questioning a witness about practices in regard to advances. Klein's questioning, however, concerned the *making* of advances and was relevant to show the availability of cash, thereby countering the government's claim that his source of cash was Bennett's sale of promotional records. That Klein had not subsequently repaid, vouchered or reported these advances as income was irrelevant to the crime charged. As this is a recurring issue in the administration of criminal justice, it is essential that this Court make clear that a defendant, by adducing *relevant* evidence on a given subject, does not open the door to *irrelevant* and *prejudicial* testimony in any way related to that subject. *Cf. United States* v. *Estell,* 539 F.2d 697, 699 (10th Cir.), *cert. denied,* 429 U.S. 982 (1976) (relevant direct questioning on sale of marijuana does not open door to questioning on source of marijuana); *United States* v. *Vigo,* 435 F.2d 1347, 1350-51 (5th Cir. 1970), *cert. denied,* 403 U.S. 908 (1971) (defendant's testimony denying knowledge of anyone convicted of heroin offense who dealt with specified

[6] In so holding, the District of Columbia Circuit has effectively overruled its dicta in *United States* v. *Smith,* 551 F.2d 348, 364n. 28 (D.C. Cir. 1976) and its progeny (discussed in Pet. p. 19), on which both the Second and Seventh Circuits have since based their contrary decisions (also discussed at Pet. p. 19).

individual did not open door to government cross-examination as to whether her husband had been so convicted and was that individual's best friend); *United States* v. *Turcotte,* 515 F.2d 145, 152 (2d Cir.), *cert. denied,* 423 U.S. 1032 (1975) (question as to arrest for cashing race track tickets under a false name held relevant to establishing knowledge of grand jury investigation, but question as to whether arrest resulted in conviction held improper because irrelevant and prejudicial).

Conclusion

The petition for a writ of certiorari should be granted.

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